United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

Affidavit

75-6071

To be argued by
V. PAMELA DAVIS

B
P/S

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 75-6071

ISRAEL MILLSAP,
Plaintiff-Appellant,

—v.—

DONALD JOHNSON, Administrator of Veterans Affairs,
Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR DEFENDANT-APPELLEE

ROBERT B. FISKE, JR.,
United States Attorney for the Southern District of New York, Attorney for Defendant-Appellee.

V. PAMELA DAVIS,
NAOMI REICE BUCHWALD,
Assistant United States Attorneys, Of Counsel.

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BRIEF FOR DEFENDANT-APPELLEE

Statement of the Case

The plaintiff-appellant Israel Millsap ("Mr. Millsap") appeals from an endorsed order and judgment entered in the United States District Court for the Southern District of New York on June 24, 1975 by the Hon. Sylvester J. Ryan denying Mr. Millsap's motion to reopen a final judgment pursuant to Rule 60(b), Fed. R. Civ. P.

Mr. Millsap filed his complaint on October 17, 1972 alleging three real estate transactions, two purchases by him and a down payment, with which he was dissatisfied because of the poor condition of the buildings he had purchased. Although the Administrator of Veterans Affairs was named as defendant, the complaint itself

contained no reference to him or the agency. Mr. Millsap sought money damages and a directive to have a building "fix[ed] up." *

On May 3, 1973, both Mr. Millsap and the Assistant United States Attorney appeared before Judge Ryan. Mr. Millsap was granted permission to file an amended complaint which complaint was to allege a proper jurisdictional base and cause of action. As this was not done, a motion for summary judgment was filed on behalf of the defendant on January 24, 1974. This motion, which raised certain jurisdictional problems,** also addressed the merits of the claim. The Government introduced the three contracts of sale between Mr. Millsap and the Veterans Administration for the three pieces of property which were the subject of the complaint. These contracts clearly stated that the sales were on an "as is" basis with an express disclaimer of warranty. The contracts also showed that Mr. Millsap was represented by an attorney for the purchases.

By endorsed order and judgment dated February 6, 1974, Judge Ryan granted the defendant's motion for summary judgment on the merits.*** Mr. Millsap did not appeal. Instead, on May 8, 1975, over a year later, Mr. Millsap filed a handwritten document which he styled "a motion to reopen case," presumably pursuant to Rule 60(b), Fed. R. Civ. P. Judge Ryan referred this motion to a United States Magistrate for a report. This report, dated June 2, 1975, recommended denial of the motion. It is attached *infra* as "A-2".

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* Plaintiff, appearing *pro se*, has not filed an appendix. The complaint is therefore attached to this brief as an addendum labeled "A-1."

** For a discussion of the jurisdictional issue see the Report of the United States Magistrate, pp. 2-3, attached *infra* as "A-2".

*** This endorsed order is attached as "A-3" *infra*.

On June 24, 1975, by endorsed order, Judge Ryan denied this motion. Mr. Millsap filed a notice of appeal on July 15, 1975 which stated that he appealed from the original February 6, 1974 order. In denying the defendant-appellee's motion to dismiss this appeal as untimely, this Court, in an order dated October 9, 1975, construed the appeal as having been taken from the denial of the motion to reopen.*

Issue Presented

Did the District Court abuse its discretion in denying appellant's motion to vacate the judgment pursuant to Rule 60(b) Fed.R.Civ.P. which motion was made a year and three months after entry of the judgment he sought to vacate?

Statement of Facts

On May 5, 1972, Mr. Millsap purchased two buildings in the Bronx from the Veterans Administration, one at 665 E. 165th Street, one at 408 E. 159th Street. He also placed a $100 down payment on a building at 1167 Stebbens Avenue in the Bronx, but the sale was not completed. (Complaint, pars. 1-3). Mr. Millsap stated in his affidavit submitted to this Court dated August 15, 1975 that he "did not close on 1167 Stebbens because [he] found out it was under demolition."

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* The motion to dismiss the appeal was filed on September 11, 1975. By service of a summons and complaint dated September 15, 1975 Mr. Millsap commenced an action in the Supreme Court of the State of New York, County of New York, naming as defendant "Donald E. Johnson or his successor, Veterans Administration." The handwritten complaint again alleged dissatisfaction with the same property which is the subject of the complaint herein. This action was removed to the United States District Court, Southern District of New York on October 20, 1975. This action is presently pending before the Honorable Lawrence W. Pierce. *Millsap* v. *Johnson*, 75 Civ. 5160 (LWP).

There were "liens and violations all over the building[s]" (Complaint, par. 1) and the water was cut off at the 159th Street property. (Complaint, par. 2).

Mr. Millsap stated in his complaint that he had not seen the 165th Street property prior to the May 1972 purchase date and that his "man did not report to [him] until July 1972." (Complaint, par. 1).

However, the sales by the Veterans Administration to Mr. Millsap had been on an "as is" basis with an express disclaimer of any warranty whatsoever. (Report of United States Magistrate, pp. 2-3). Further, the extremely low prices for the properties, $8,000 and $14,500 respectively (*Id.*, p. 2), obviously reflected the admittedly poor condition of the buildings.

Sometime prior to Mr. Millsap's motion to reopen the judgment one or both of the buildings on the purchased properties were torn down, apparently as a result of the "violations" noted by Mr. Millsap in his complaint. (Millsap aff., dated May 16, 1975).

ARGUMENT

POINT I

The District Court properly denied Mr. Millsap's motion to reopen the judgment pursuant to Rule 60(b) of the Federal Rules of Civil Procedure.

Rule 60(b), Fed. R. Civ. P., provides for the granting by the District Court of relief from a final judgment upon a showing of:

1) mistake, inadvertence, surprise or excusable neglect;

2) newly discovered evidence;

3) fraud, misrepresentation or other misconduct of an adverse party;

4) the voidness of the judgment;

5) satisfaction of the judgment or the inequity of prospective application; or

6) any other reason justifying relief from the operation of the judgment.

The rule further provides that the motion must be made within one year of the entry of the judgment complained of when it is based upon any of the first three grounds. Thus, if Mr. Millsap's complaints are construed as allegations of mistake, newly discovered evidence or fraud or misrepresentations by the Veterans Administration, his motion was time barred having been made in May of 1975 to open a judgment entered in February of 1974. *Serzysko* v. *Chase Manhattan Bank*, 461 F.2d 699, 701-702 (2d Cir. 1972), *cert. denied*, 409 U.S. 883 (1972); *Simons* v. *United States of America et al*, 452 F.2d 1110, 1115 (2d Cir. 1971).

The one year limit is observed even where the party appears *pro se*, *Serzysko* v. *Chase Manhattan Bank*, *supra*, and particularly where the motion *could* have been brought within one year. *United States of America* v. *Martin*, 395 F. Supp. 954, 961 (S.D.N.Y. 1975).

Here, Mr. Millsap knew of the demolition when he first brought this proceeding. The demolition of the building or buildings which was cited by Mr. Millsap in his motion to reopen was clearly the result of the "violations" which he cited in his original complaint. Since he knew of the existence of violations he must have known that demolition would result if the violations were not cured. Indeed, he states in his affidavit submitted to

this Court dated August 15, 1975 that he did not close on one of the properties because he knew at the time that it was "under demolition." If Mr. Millsap felt that the District Court had not given adequate consideration to this issue, an issue raised in the original complaint, nothing prevented his raising it again through a timely motion to reopen. More to the point, he could have simply exercised his right to appeal the original judgment.

As the fourth and fifth grounds, voidness or satisfaction of the judgment, are clearly inapplicable, Mr. Millsap can only obtain relief via the sixth, "any other reason" clause.

The boundaries of this clause were delineated by Chief Judge Friendly, writing for the Court in *Simons* v. *United States of America, et al., supra* at 1116:

> We begin by noting that the sentence is not an affirmative grant of power by the Rule, but rather a statement that the Rule's specification of six grounds for relief by motion "does not limit" whatever power the court would otherwise have to entertain an independent action.

Mr. Millsap has raised no new issue which would empower the District Court to entertain an independent action. On the contrary, he has simply once again asserted the issues raised in the original action, this time in the form of a motion to reopen the judgment. Indeed, not satisfied with his chances on either the motion or the appeal therefrom, he has filed the same suit again in State Supreme Court.

While the one year limitation does not apply to the sixth ground, the Rule does provide that the motion must be "made within a reasonable time."

In holding that a Rule 60(b) motion had not been brought within a reasonable time District Court Judge Milton Pollack stated:

> "In considering Rule 60(b) motions, the Courts have been unyielding in requiring that a party show good reason for his failure to take the appropriate action sooner." *United States of America* v. *Martin et al*, 395 F. Supp. 954, 961 (D.C.N.Y. 1975).

Mr. Millsap has not asserted any reason whatsoever for the year and a half hiatus between the original judgment and the flurry of activity in both the Federal and State Courts. He knew when he first filed his complaint that there were violations on two of the buildings. Indeed he knew at the time of sale that the third building was "under demolition."

It is the rule in the Second Circuit that a judgment will not be vacated pursuant to Rule 60(b) in the absence of an abuse of discretion. *Peterson* v. *Term Taxi Inc. et al.*, 429 F.2d 888, 890 (2d Cir. 1970).

Clearly it was not an abuse of discretion for the District Court to refuse to allow a plaintiff to relitigate his action by means of a motion pursuant to Rule 60(b) filed a year and a half after judgment was entered against him where no new arguments have been raised on the merits.

CONCLUSION

For the foregoing reasons, the District Court's denial of plaintiff's motion to reopen the judgment pursuant to Rule 60(b) of the Federal Rules of Civil Procedure should be affirmed.

March 8, 1976

Respectfully submitted,

ROBERT B. FISKE, JR.,
United States Attorney for the Southern District of New York, Attorney for Defendant-Appellee.

V. PAMELA DAVIS,
NAOMI REICE BUCHWALD,
Assistant United States Attorneys, Of Counsel.

ADDENDA

A-1

Complaint of Israel Millsap

SOUTHERN DISTRICT COURT OF NEW YORK

ISRAEL MILLSAP, 350 West 23rd Street, New York

—vs.—

DONALD E. JOHNSON, Veterans Administration, Washington, D.C. 20420, Administrator of Veterans Affairs.

1. On May 5th, 1972 I purchased a piece of property at 665 East 165 Street, Bronx, New York. I never saw this property until I bought it and my man did not report to me until July 1972. There are liens and violations all over the building and it is not fit for human beings to live in and I cannot get it fixed up. I am unable to get a loan on the building. Please instruct Arby A. Halpern to fix up this building and remove all liens and give me another building that is suitable for me to rent to people to live.

2. On May 5, 1972, I purchased a piece of property at 408 East 159th Street, Bronx, New York. This building is also in deplorable condition. The water is cut off from the street and they refuse to remove all liens and violation and they also said that I no longer own this property. Please instruct Arby A. Halpern and Silverman of the Loan Guarantee Department not to forbid me to go into this property until the Court has made a final decision and I therefore ask judgment for $50,000.

3. I went to contract on 1167 Stebens Avenue, Bronx, New York. Arby A. Halpern instructed Hawley & Hawley, real estate agent to give him $100. He promised to fixed

the building up which he never did and I request that you return me the $100.00.

Sworn before me
17 October, 1972

ISRAEL MILLSAP

LENA R. RAFTER
Notary Public, State of New York
No. (illegible)
Qualified in Queens County
Term Expires March 30, 1974

Report of United States Magistrate

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

72 Civ. 4418 (SJR)

ISRAEL MILLSAP,

Plaintiff,

—v.—

DONALD E. JOHNSON, Administrator of Veterans Affairs,

Defendant.

TO THE HONORABLE SYLVESTER J. RYAN, U.S.D.J.:

This report relates to an application by plaintiff, filed in court on May 8, 1975 and referred by you to me for review and recommendation, for an order reopening this case, which was the subject of a judgment rendered by you as of February 7, 1974 granting summary judgment to the Government dismissing the complaint against the named defendant, Donald E. Johnson, Administrator of Veterans Affairs.

Plaintiff's motion, written in longhand and filed May 8, 1975, reads as follows:

> "I would like to make motion to reopen case on May 16, 1975 at 9:30 A.M. on the ground that the Veterans Administration sold me this property which had violations and under demolition. The V.A. knew about this. They are no longer standing . . ." Signed, Israel Millsap, 9537 Prarie Avenue, So., Chicago, Ill. 60628.

The application just quoted is, in effect, a motion under Rule 60(b) of the Federal Rules of Procedure to reopen a final judgment. However, neither the application itself,

nor the virtually illegible longhand affidavit in support of the motion thereafter filed with me on May 16, 1975 and forwarded herewith give any reason for the granting of the requested relief other than the claim that the Veterans Administration defrauded the plaintiff. But this is the very issue that your Honor previously disposed of in granting summary judgment in favor of the Government. You were persuaded, on the basis of the record before you, that there had been no overreaching by the Veterans Administration and that the property in question had been sold to the plaintiff strictly on an "as is" basis, with an express disclaimer of any warranties whatsoever.

From my examination of the prior records pertaining to this case, the following facts appear. The Veterans Administration, which of course periodically obtains title to real estate in foreclosure proceedings as successor in interest to the mortgagee (by virtue of its guarantees of G.I. Bill of Rights mortgage loans), and which customarily resells property so acquired to private buyers, had the following three transactions with the plaintiff in 1972:

1. Plaintiff purchased property from the V.A. at 665 E. 165 Street, Bronx, for $8,000 cash;

2. Plaintiff purchased property from the V.A. located at 408 E. 159 Street, Bronx for $14,500 cash;

3. Plaintiff made a down payment of $100 respecting V.A. property at 1187 Stebbens Avenue, Bronx, N.Y.

It further appears that plaintiff thereafter learned that the buildings which he had purchased (or in one case on which he had placed a deposit) were all subject to violation notices posted by the New York City Department of Buildings. Accordingly, plaintiff brought this action in

1972 against the Veterans Administration, seeking an adjudication that he was entitled to a return of the monies paid aforesaid to the Veterans Administration.

Thereafter, on February 7, 1974, you granted the Government's motion for summary judgment dismissing the complaint. That motion, was, of course, based upon the Government's contention that the property in question had been sold to the plaintiff under a contract stipulating that the property was to be sold "as is", with an express disclaimer of any warranty whatsoever respecting title or condition of the property. In support of its position the Government cited, among other cases, the case of *American Elastics* v. *United States*, 187 F.2d 109, 2d Cir. 1051, *cert. denied.**

The named defendant, Donald E. Johnson, is of course sued solely in his official capacity. Plaintiff, in making his complaints to the Court, specifically and repeatedly refers to the Veterans Administration as an organization, rather than to Donald E. Johnson as an individual. Essentially, this action is an action against the United States Government. Accordingly, the suit is governed by the rule that a sovereign can be sued only with its content. While the United States Government has, in fact, consented to be sued for breach of contract or breach of warranty (Title 28 U.S.C. § 1346(a)), the Government has *not* consented to be sued for fraud. Moreover, even if it had so consented it is clear from the record that the property in question was sold to the plaintiff pursuant to contracts which contained an express disclaimer clause.

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* The Assistant United States Attorney in charge of this matter has advised me that the Government is content to rest upon the record of its prior motion for summary judgment and does not desire to submit any further papers in opposition to the plaintiff's motion.

Rule 60(b) F.R.C.P. permits a person to be relieved of a final judgment upon a showing of (1) mistake, inadvertence, surprise or excusable neglect; (2) newly discovered evidence; (3) fraud; (4) a showing that the judgment is void; (5) a showing that the judgment has been satisfied or it is no longer "equitable", that the judgment should have prospective application; or (6) a showing of "any other reason justifying relief from the operation of the judgment." Quite clearly, none of the first five grounds mentioned in Rule 60(b) apply here; and the so-called "any other reason clause" certainly cannot be the basis for an order vacating the prior judgment merely based upon the assertion that the original judgment was wrongfully granted. Plaintiff could have appealed from the February 7, 1974 judgment and failed to do so. It is wholly inappropriate, therefore, to grant the relief here sought.

It might be added that the time limitation for making a motion under subdivisions (1) ("mistake"), (2) ("newly discovered evidence") or (3) ("fraud") is one year. Accordingly, it would appear that to the extent subdivisions (1) to (3) are relied on by plaintiff, the instant motion is in any event time barred.

For the reasons hereinabove stated, it is recommended that the plaintiff's motion to vacate the judgment heretofore filed on February 7, 1974 dismissing the complaint be denied in all respects.

Copies of this report have been mailed this date to the plaintiff Pro Se and to the United States Attorney, both of whom are instructed that any objections to this report must be mailed to your chambers within ten days.

Report of United States Magistrate

The papers considered by me on this motion are forwarded herewith:

1. Plaintiff's motion, filed 5/8/75, under Rule 60(b) to reopen judgment of 2/7/74;
2. Plaintiff's supporting longhand affidavit dated 5/16/75;
3. Copy of New York City Department of Buildings violation notice dated 2/15/73 re property located at 665 West 165 Street, furnished to me by plaintiff on 5/16/75 as an exhibit respecting his motion.

Dated: New York, N.Y.
June 2, 1975.

Respectfully submitted,

HAROLD J. RABY
United States Magistrate

cc: MR. ISRAEL MILLSAP
9537 Prarie Avenue, So.
Chicago, Ill. 60628

MR. ISRAEL MILLSAP
350 West 23 Street
New York, N.Y. 10011

V. PAMELA DAVIS, ESQ.
Assistant United States Attorney
U.S. Court House
Foley Square
New York, N.Y. 10007

Endorsement

72 Civ. 4418

ISRAEL MILLSAP

—v.—

DONALD JOHNSON, etc.

Defendant moves pursuant to Rule 56, F.R.C.P., for summary judgment. On May 3, 1973, the pro se plaintiff was given permission to file an amended complaint which would contain allegations and jurisdictional basis upon which this Court could act.

Plaintiff pro se has never submitted or filed an amended complaint and the allegations as stated of the present complaint present no basis for jurisdiction or relief in this Court.

The motion of the United States Attorney to grant summary judgment is granted. The complaint is dismissed on the merits but without costs.

So ordered.

Dated: February 6, 1974.

SYLVESTER J. RYAN
U.S.D.J.

A true copy,

A. DANIEL FUSARO
Clerk

★ U. S. Government Printing Office 1976— 614—350—128

Form 280 A-Affidavit of Service by Mail
Rev. 12/75

AFFIDAVIT OF MAILING

State of New York)
County of New York) ss

Marian J. Bryant, being duly sworn, deposes and says that she is employed in the Office of the United States Attorney for the Southern District of New York.

That on the 2

8th day of March, 19 76 she served ~~a~~ copys of the within govt's brief

by placing the same in a properly postpaid franked envelope addressed:

Israel Milsap,
9537 Prarie Ave.
Chicago Ill

And deponent further says she sealed the said envelope and placed the same in the mail ~~chute~~ drop for mailing in the United States Courthouse Annex, One St. Andrews Plaza, Borough of Manhattan, City of New York.

Marian J. Bryant

Sworn to before me this

8th day of March, 19 76

Ralph I. Lee

RALPH I. LEE
Notary Public, State of New York
No. 41-2292838 Queens County
Term Expires March 30, 1977